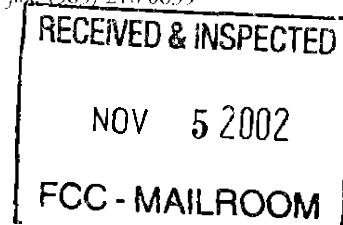




ORIGINAL
EX PARTE OR LATE FILED

Mpower Communications Corp.

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November 4, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
9300 E. Hampton Drive
Capitol Heights, MD 20743

By: Fed-Ex

Re: Late Filed Ex Parte - BellSouth 271 - WC 02-307

Dear Secretary Dortch:

Mpower Communications Corp. ("Mpower") filed Comments in this docket on October 10, 2002. Subsequently, Mpower was contacted by the FCC Pricing Division Staff regarding a conference call to clarify Mpower's positions and arguments in the section of its Comments on BellSouth's Key Customer Promotional Tariffs. A conference call was set for October 21, 2002, at which time Mpower explained why it believes this on-going program, limited to Central Offices where competitive local exchange carriers have customers, results in unjust and discriminatory pricing under Item 2 of the 14-Point Checklist.

In connection with this conference call, Mpower was asked to provide copies of the Complaint in Florida PSC Docket 020119-TP, on BellSouth's Key Customer promotional tariff pricing and marketing practices, and the Florida Commission's Notice of Proposed Agency Action Order Regarding BellSouth's 1002 Key Customer Tariff Program and Winback Promotions, issued June 28, 2002, in that docket. Copies are attached.

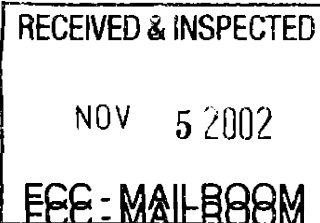
Sincerely,

Marilyn H. Ash,
Counsel - Legal & Regulatory Affairs

- cc. Janice Myles, w/ attach.
- cc. Monica Desai, w/o attach.
- cc. Judith Nitsch, w/o attach.
- cc. Vienna Jordan, w/o attach.
- cc. Joshua Swift, w/o attach.
- cc. Jeffrey Dygert, w/o attach.
- cc. Cara Grayer, w/o attach.
- cc. Christine Newcomb, w/o attach.
- cc. Qualex International, Inc., w/ attach

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, **by** Florida Digital Network, Inc.

DOCKET NO. 020119-TP
ORDER NO. PSC-02-0875-PAA-TP
ISSUED: June 28, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

NOTICE OF PROPOSED AGENCY ACTION
OKDER REGARDING BELL SOUTH'S 2002 KEY CUSTOMER
TARIFF PROGRAM AND WINBACK PROMOTIONS

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

CASE BACKGROUND

On January 15, 2002, BellSouth Telecommunications, Inc. (BellSouth) filed its 2002 Key Customer promotional tariff, Tariff No. T-020035, which became effective on January 31, 2002. On February 14, 2002, Florida Digital Network, Inc. (FDN) filed a Petition for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs and For **An** Investigation of BellSouth Telecommunications, Inc.'s

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Promotional Pricing and Marketing Practices (Petition). On March 5, 2002, BellSouth filed its Response and Answer to FDN's Petition.

The promotional tariff at issue terminated on June 25, 2002. Based upon a history of BellSouth's past tariff filings, it is not uncommon for BellSouth to begin a new promotion upon, or near, the termination date of any given program. To illustrate, on May 10, 2002, BellSouth issued a notification to carriers of its intent to file a substantially similar tariff on June 11, 2002, to become effective on June 26, 2002, which is the day after the promotional tariff at issue expires. Based on the notification, the anticipated discount levels and terms are slightly different, yet the qualifications and restrictions appear to be identical.

On March 13, 2002, we issued Order No. PSC-02-0331-PCO-TP, to initiate an expedited discovery procedure in this docket because of the limited duration of this tariff. Additionally, the expedited discovery procedure was ordered because customers may continue to avail themselves of this tariff option while a determination as to its validity is pending or at least until the termination date.

We note that on March 25, 2002, BellSouth filed a Motion for Reconsideration (Motion) of the Prehearing Officer's Order No. PSC-02-0331-PCO-TP. issued March 13, 2002. On April 2, 2002, FDN filed a Response to the Motion. The Motion asks for reconsideration of the discovery time frames required in the Order. In discussions between our staff counsel and counsels for BellSouth and FDN, the concern regarding the discovery time frame has been reviewed on a going-forward basis. However, it is our understanding that should this matter be set for hearing, an Order Establishing Procedure would be issued with new discovery time frames. If, however, this docket is closed, there would be no need to address the Motion. In either case, the Motion would be rendered moot. Therefore, the Motion is not being addressed in this Order and will be addressed separately, if necessary.

This Order addresses the allegations raised by FDN with respect to the tariff filing and BellSouth's marketing practices, including, but not limited to "winbacks" and customer retention practices.

We are vested with jurisdiction in this matter pursuant to Sections 364.01, 364.051, 364.08, and 364.285, Florida Statutes.

I. 2002 KEY CUSTOMER TARIFF

The issue here is whether BellSouth's 2002 Key Customer Program tariff (T-020035) filing meets certain criteria, including whether the rates for services purchased under it are compensatory. We believe that in order to be compensatory, a service offering or tariff must be priced at a rate equal to or greater than its incremental cost. To determine if BellSouth's 2002 Key Customer Program meets the criteria required for tariffs, we must address the following questions:

- A) Is BellSouth's 2002 Key Customer Program tariff unduly discriminatory in concept?
- B) Are the rates for services purchased under BellSouth's 2002 Key Customer Program compensatory?
- C) Are the rates for BellSouth's 2002 Key Customer Program less than the wholesale cost for an ALEC?

General Overview

On January 15, 2002, BellSouth filed a tariff package entitled the 2002 Key Customer Program, with an effective date of January 31, 2002. The promotional tariff at issue terminated on June 25, 2002. The 2002 Key Customer promotional tariff replaces the 2001 Key Customer Program, though the 2001 Key Customer Program had not yet expired. (See T-020035) The specific discount terms in the two promotions are different, and we note that no petitions were filed in opposition to the 2001 Key Customer Program which was filed on June 11, 2001. Additionally, as stated in the Case Background, on May 10, 2002, BellSouth issued a notification to carriers of its intent to file a substantially similar tariff on June 11, 2002, to become effective on June 26, 2002, which is the day after the promotional tariff at issue **expires**. Based on the notification, the anticipated discount levels and terms are slightly different, yet the qualifications and restrictions appear to be identical.

The tariff package for the 2002 Key Customer Program set forth the offering, eligibility, and the restrictions of the offering, which are briefly summarized below.

2002 Key Customer Program Promotional Offering

- Percentage discount of 10 or 25% off of the customer's monthly total billed revenue', depending upon the length **of** contract signed. [The percentages are 10% for a 18 month contract, and 25% for a **36** month contract.]
- Percentage discount of 50 or 100% off of the monthly hunting service fees, depending upon the length of contract signed. [The percentages are 50% for a **18** month contract, and 100% **for** a 36 month contract.]
- A choice of Internet services consisting of certain waivers or monthly credits. [Specific offers vary **by** Internet product type.]

2002 Key Customer Program Eligibility

- Program is available to existing, new, or former BellSouth business customers that are served from selected wire centers, and who have monthly revenues in the range of \$75.00-\$3,000.00 per month.
- The promotion began on January 31, 2002, and ends on June 25, 2002.
- Subscriber must sign a 18 or 36 month agreement to receive the benefits of the program.

2002 Key Customer Program Restrictions

- BellSouth customers with aggregate annual billings exceeding \$36,000 per state are not eligible to participate in this program.

'Bellsouth monthly total billed revenue consists of total recurring, non-recurring, and usage charges subject to certain exclusions for nonregulated services, taxes, late payment charges, or access revenues.

- Customers with existing Volume and Term Agreement Contract Service Arrangements are not eligible to participate in this program.
- Customers with Analog Private Line Services are not eligible to participate in this program.
- In the event that the subscriber terminates the contract, the subscriber must pay BellSouth all cumulative discounts received to date.

Prior to the tariff's effective date, our staff requested a meeting with BellSouth representatives to discuss some concerns about the initial filing, requesting BellSouth to specify the wire centers that were eligible and to supply cost data to support the tariff filing. On January 17, 2002, BellSouth representatives and our staff met, and BellSouth subsequently substituted certain tariff pages. The tariff was processed administratively and became effective on January 31, 2002.

Although the effective date of BellSouth's 2002 Key Customer Program tariff was January 31, 2001, FDN petitioned this Commission on February 14, 2002, to:

. . . enforce Sections 364.01(4) (a), (c), and (g), 364.051(6), 364.08, 364.09, 364.10, and 364.3381(3), Florida Statutes, and, specifically, to immediately review and cancel or, alternatively, suspend or postpone, the 2002 Key Customer tariff and any like tariffs filed by BellSouth Telecommunications, Inc. ("BellSouth") and to launch a comprehensive investigation of BellSouth's promotional pricing and marketing practices.

FDN states that we have not reviewed the cost basis for the promotional discounts in BellSouth's 2002 Key Customer tariff filing. "The Commission is required to do so in support of a finding of anticompetitive behavior and irreparable harm, or to suspend/postpone a tariff," according to FDN. FDN alleges that *it* and other ALECs have suffered "and will continue to suffer irreparable competitive harm" if BellSouth's promotional tariff remains in effect.

In addition, FDN claims that BellSouth's 2002 Key Customer Program tariff is aimed exclusively at existing and potential ALEC customers. FDN believes that BellSouth's 2002 Key Customer Program tariff and other promotional tariffs are "unduly discriminatory on their face." FDN alleges that the prices offered in the 2002 Key Customer Program " . . . are designed to, and have no purpose other than to, eliminate the competition."

BellSouth counters that FDN's claims are unsubstantiated and states:

If the real-world facts bore any resemblance to these allegations, a dwindling number of ALECs in Florida would be serving a . . . steadily declining number **of** business access lines . . . [when, however,] just the opposite is happening.

BellSouth maintains that the 2002 Key Customer Program is "not limited to end users that are being served by ALECs or that are considering purchasing services from an ALEC. Instead, *any* business customer that . . . meets the . . . eligibility requirements may participate in the program."

Additionally, BellSouth responds to FDN's allegation that the 2002 Key Customer Program results in rates that are lower than an ALEC reseller's wholesale cost as follows:

This allegation is utterly without merit because the 2002 Key Customer Program itself is available for resale.

A) Is BellSouth's 2002 Key Customer Program tariff unduly discriminatory in conceut?

FDN believes that BellSouth's 2002 Key Customer Program tariff "extends discounted rates to one segment of small business customers who are indistinguishable from all other small business customers during the effective period of the lower rates," since BellSouth is only offering the promotion in *those* wire centers that have an ALEC presence, the so-called "hot wire centers." FDN asserts that business customers across all wire centers are similarly situated; having or lacking an ALEC presence should not be material, according to FDN, and BellSouth's 2002 Key Customer

Program "does not treat them equally." Additionally, FDN contends that BellSouth markets to soon-to-be-former customers using different means and methods than it employs for all other customers.

BellSouth states that it selected the "hot wire centers" on the basis of "heightened competitive activity in those wire centers." (BellSouth response to Petition at p. 7) BellSouth references Section 364.051 (5)(a), Florida Statutes, which states in part:

364.051 Price regulation.--

. . .

(5) NONBASIC SERVICES.--Price regulation of nonbasic services shall consist of the following:

(a) . . . Nothing contained in this section shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services in a specific geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.

. .

We opine that nothing in Section 364.051(5)(a), Florida Statutes, prohibits or restricts a LEC **from targeting specific** geographic markets and offering volume and term discounts. Therefore, we believe that BellSouth's targeting is permissible under the provisions of this statute. **As** a result, we are not swayed by FDN's contention that BellSouth's 2002 Key Customer

Program tariff is unduly discriminatory based upon the argument that BellSouth only selectively offers the promotion in the so-called "hot wire centers."

In addition, FDN argues that BellSouth's 2002 Key Customer Program is discriminatory because it coincides with a separate tariff offering that increases the rates for all retail residential and business customers, including those not served by "hot wire centers." FDN asserts that such coincident action is anticompetitive behavior, and that "BellSouth, the dominant carrier in its Florida territory, has embarked on a course to selectively eliminate Florida's competing carriers through discriminatory offers and anticompetitive practices designed to lure away the competitors' current and potential customers."

On January 11, 2002, BellSouth filed a tariff with this Commission to increase basic and nonbasic local exchange service rates in accord with Section 364.051, Florida Statutes. (See T-020030) The effective date of said tariff was February 16, 2002. We cite the relevant parts of Section **364.051**, Florida Statutes:

(2) BASIC LOCAL TELECOMMUNICATIONS SERVICE.--Price regulation of basic local telecommunications service shall consist of the following:

(a) Effective January 1, 1996, the rates for basic local telecommunications service of each company subject to this section shall be capped at the rates in effect on July 1, 1995, and such rates shall not be increased prior to January 1, 2000. However, the basic local telecommunications service rates of a local exchange telecommunications company with more than 3 million basic local telecommunications service access lines in service on July 1, 1995, shall not be increased prior to January 1, 2001.

(3) In the event that it is determined that the level of competition justifies the elimination of price caps in an exchange served by a local exchange telecommunications

company with less than 3 million basic local telecommunications service access lines in service, or at the end of 5 years for any local exchange telecommunications company, the local exchange telecommunications company may thereafter on 30 days' notice adjust its basic service prices once in any 12-month period in an amount not to exceed the change in inflation less 1 percent. Inflation shall be measured by the changes in the Gross Domestic Product Fixed **1987** Weights Price Index, or successor fixed weight price index, published in the Survey of Current Business or a publication, by the United States Department of Commerce. In the event any local exchange telecommunications company, after January 1, 2001, believes that the level of competition justifies the elimination of any form of price regulation, the company may petition the Legislature.

. .

(5) NONBASIC SERVICES.--Price regulation of nonbasic services shall consist of the following:

(a) . . . a price increase for any nonbasic service category shall not exceed 6 percent within a 12-month period until there is another provider providing local telecommunications service in an exchange area at which time the price for any nonbasic service category may be increased in an amount not to exceed 20 percent within a 12-month period, and the rate shall be presumptively valid.

We reviewed the earlier tariff (T-020030) and determined that the rate increases were in compliance with the applicable statutes. We do *not* believe the two tariff filings conflict with the provisions of Section 364.051, Florida Statutes, and as such, we do *not* believe that FDN has demonstrated that the tariffs, alone or in combination, are unduly discriminatory in concept.

FDN also alleges that the termination liability provision in the 2002 Key Customer Program is discriminatory. The Petition states:

To take advantage of BellSouth's promotional pricing, subscribers must accept a "poison pill" condition that makes it extremely costly for them to later change carriers. Subscribers that sign **up** to receive promotional discounts, but leave BellSouth service before expiration of the contract term must reimburse BellSouth for **all** discounts received **and** pay any applicable termination charges.

We note, however, that a termination liability is commonplace in many types of contracts, not just contracts signed in conjunction with a promotional offering.² We do not agree **with** FDN's characterization that a termination liability is "a poison pill," inasmuch as the customer is making a tradeoff -- lower rates in return for a commitment period. We find that such tradeoffs are a common business practice, and that BellSouth's 2002 Key Customer Program tariff is not unduly discriminatory.

B) Are the rates for services purchased under BellSouth's 2002 Key Customer Program compensatory?

In **order** for an offering to **be** compensatory, **we** believe that it must be offered *at* a rate equal to or greater than its incremental cost. FDN argues that BellSouth's price inducements, up to and including free services in certain circumstances, are anticompetitive and violate certain Florida Statutes. In its Petition, FDN states:

[T]he Commission has not reviewed the cost bases for the promotional discounts. The Commission is required to do so in support of a finding of anticompetitive behavior and irreparable harm, or to suspend/postpone a tariff. Pricing below profitability is not the applicable legal test. Rather, the commission may act to halt (at least temporarily) any pricing/conduct that on its face is more

²For example, termination liability provisions are very common in contracts for **wireless services**.

anticompetitive than pro-competitive. In any case, one cannot say BellSouth's promotional prices are at a point above profitability or may be offered as a result of BellSouth's superior efficiency without questioning: (a) why BellSouth does not offer the promotional prices and free services to all of its customers, (b) how BellSouth can offer free and significantly discounted service without creating cross subsidies, (c) why BellSouth has increased rates to its other retail customers, and (d) why the tariff requires a subscriber to reimburse BellSouth if migrating before term's end.

BellSouth contends that FDN's petition offers "no facts whatsoever" to infer that BellSouth is not in compliance with the applicable statutes. Furthermore, BellSouth states that the commission staff explored these topics with Company representatives in a January 17, 2002, meeting in which BellSouth provided information to "demonstrate that its prices comply with Florida Statute Section 364.052 [sic] and, therefore, do not create cross subsidies."

We note that Section 364.08(2), Florida Statutes, addresses the statutory language regarding free service. Additionally, the sale of services at a below-cost rate is the topic of Section 364.051(5)(b) and (c). The pertinent portions of these statutes are as follows:

364.08 Unlawful to charge other than schedule rates or charges; free service and reduced rates prohibited.-

. . .

(2) A telecommunications company subject to this chapter may not, directly or indirectly, give any free or reduced service between points within this state. However, it is lawful for the commission to authorize employee concessions if in the public interest.

364.051 Price regulation.-

. . .

(5) **NONBASIC SERVICES**.--Price regulation **of** nonbasic services shall consist of the following:

(b) The commission shall have continuing regulatory oversight of nonbasic services for purposes of ensuring resolution **of** service complaints, preventing cross-subsidization of nonbasic services with revenues from basic services, and ensuring that all providers are treated fairly in the telecommunications market. The cost standard for determining cross-subsidization is whether the total revenue from a nonbasic service is less than the total long-run incremental cost of the service. Total long-run incremental cost means service-specific volume and nonvolume-sensitive costs.

(c) The price charged to a consumer for **a** nonbasic service shall cover the direct costs of providing the service and shall, to the extent **a** cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service.

We note that via discovery, certain cost data was obtained from BellSouth and evaluated. Specifically, a confidential cost analysis spreadsheet was produced along with various "typical customer" examples that supported BellSouth's price levels. BellSouth asserts that the rates for services purchased under BellSouth's 2002 Key customer Program are *compensatory* based upon "typical customer" configurations.

In BellSouth's response to Staff Interrogatories Nos. 1-3 and Requests for Production of Documents Nos. 1-3, BellSouth submitted

copies of the single-sheet enrollment forms for "actual" subscribers enrolled between January 31, 2002 and March 18, 2002. BellSouth did not identify the quantity of these forms, though our staff estimates the number to be approximately 4,500. The enrollment forms, however, did not provide any sort of data about the quantities or types of individual services BellSouth was providing to these subscribers. Nonetheless, our staff was able to determine that the percentage of contracts which are potentially non-compensatory is very low, based upon our analysis of other (confidential) information, related to the approximately 4,500 subscribers, that was provided.

In BellSouth's response to Staff Interrogatory No. 6, BellSouth states that it is not in violation of Section 364.08(2), Florida Statutes, by offering a 100% discount on line hunting service because this service is not a stand-alone offering and must be purchased with another service, and "the promotion as a whole covers cost." In response to Staff Interrogatory No. 14, BellSouth produced additional "typical configuration" examples for customers with services such as MegaLink®, ESSX®, MultiServ®, Centrex, and PBX which indicate that the discounted pricing in the 2002 Key Customer Program is compensatory.

Although BellSouth's examples of "typical customer" scenarios indicate that the rates for services purchased under BellSouth's 2002 Key Customer Program are compensatory, "actual" customer data was not evaluated. An argument could be made that an analysis of the rates and incremental costs associated with the services purchased by actual (as opposed to typical) customers might be necessary to conclusively determine if services purchased under BellSouth's 2002 Key Customer Program are compensatory. AS previously stated, based on our analysis of BellSouth's responses to our staff's discovery, we can determine that the percentage of contracts which are potentially non-compensatory is very small. Hence, we find that the rates for services purchased under BellSouth's 2002 Key Customer Program are compensatory.

C) Are the rates for BellSouth's 2002 Key Customer Program less than the wholesale cost for an ALEC?

Under the maximum terms of this promotion, an eligible subscriber would be entitled to a 25% discount on the total billed

revenue as set forth in the tariff. (See **T-020035**) FDN contends that such a substantial discount off of retail rates for a single group of small business customers calls into question the sufficiency of BellSouth's avoidable costs:

If BellSouth can make do with revenue from small business customers that is reduced by 25%, then perhaps BellSouth needs less revenue from its small business customers and/or BellSouth's wholesale rate to resellers should have a greater percentage reduction than the rate currently approved by the commission.

BellSouth denies FDN's allegations and states that its post-discount rates after application of either the 10 or 25% factor are not below the ALEC's wholesale cost for resale or UNES, citing examples with actual rates.

BellSouth also states that its 2002 Key Customer Program is available for resale, stating that any services resold **would** be subject to the current resale discount rate of **16.81%**. An **ALEC** reseller will always pay less to resell a promotion, according to BellSouth. BellSouth also discusses the framework for **an** avoided cost calculation as provided in Section 252(d)(3) of the Act. BellSouth states that the Act:

provides that the resale rate for a service is the retail rate for the service less the costs BellSouth avoids when it provides on a wholesale (as opposed to retail) basis . . . After these avoided costs are removed from the retail rate of the service, the resulting resale rate may include, among other things: (1) costs that are **not** avoided by providing the service on a wholesale basis; (2) contribution to overhead; and/or (3) any profit margin that was built into the retail rate.

BellSouth states that FDN "simply does not support its claims **of** anticompetitive pricing."

Section 252(d)(3) of the Act reads:

(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.-

For purposes of Section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Accordingly, the resulting wholesale rate may bear no resemblance to the incremental cost of providing the service at retail. We believe that BellSouth's ability to discount its retail rates and still cover incremental cost is not instructive in determining the reasonableness of the wholesale discount. Thus, we do not believe FDN's assertions are on point. We do not believe the rates for BellSouth's 2002 Key Customer Program are less than the wholesale cost for an ALEC.

Though not directly related to any of the three preceding topics, we had concerns about how BellSouth was (and is) adhering to the restrictions of Tariff No. T-020035, particularly in light of BellSouth's initial disclosure that it may have erroneously enrolled customers in its 2002 Key Customer Program. After a thorough analysis, BellSouth reported that only eight (8) customers were erroneously enrolled through May 10, 2002. BellSouth attests that all eight (8) of these customers were BellSouth customers at the time their respective contracts were signed, and acknowledges that those enrollments were improper. BellSouth states that it is contacting these affected customers and offering them options for resolving the discrepancy. BellSouth traced the erroneous enrollments to specific salespersons, who have been counseled about the restrictions for the 2002 Key Customer Program. In addition, BellSouth orally re-emphasized that message to its entire sales force, and is developing a "written reiteration" on the topic.

Conclusion

Based on the foregoing, we are not swayed by FDN's allegations that BellSouth's 2002 Key Customer Program tariff was unduly, discriminatory. Neither are we convinced that the rates for services purchased under the Program were non-compensatory. Therefore, we find that BellSouth's 2002 Key Customer tariff filing (T-020035) shall not be canceled.

II. "WIN-BACK" PROMOTIONS

Initiating a "win-back" program can be very advantageous for carriers. A study by Marketing Metrics found the average company has a 20 to 40 percent probability of successfully regaining a previous customer, and only a 5 to 20 percent probability of making a successful sale to a new prospect³.

We believe a "win-back" promotion is not in and of itself detrimental to competition. In fact, "win-back" promotions can be very beneficial to Florida consumers by giving them a choice of providers with varied services at competitive prices. The Federal Communications Commission (FCC) addressed "win-back" marketing in Order FCC 99-223, stating:

Win-back facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs.

The concept of "win-back" can be divided into two distinct types of marketing: marketing intended either to (1) regain a customer, or (2) retain a customer. Regaining a customer applies to the marketing situation where a customer has already switched to and is receiving service from another provider. Retention marketing, by contrast, refers to a carrier's attempts to persuade a customer to remain with that carrier before the customer's service is switched to another provider.

³Customer Winback - How to Recapture lost customers and keep them loyal". by Jill Griffin and Michael W. Lowenstein

A. "Win-back" Marketing to Regain a Customer

"Win-back" marketing programs by Incumbent Local Exchange Companies (ILECs) to regain a customer have been addressed by many state commissions. Actions taken by other states have ranged from a minimum action such as a mandatory waiting period before "win-back" marketing by the ILEC can commence, to a more stringent action such as outright rejection of "win-back" promotional tariffs to allow the ALECs to gain a foothold in the market.

The **FCC** has also addressed "win-back" marketing promotions. In Order **FCC 99-223**, released September 3, 1999, the **FCC** stated:

Some commenters argue that ILECs should be restricted from engaging in "win-back" campaigns, as a matter of policy, because of the ILECs' unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of **CPNI** gathered by ILECs will chill potential local entrants and thwart competition in the local exchange. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation at Part V.C.3, *infra*. However, once a customer is no longer obtaining service from the ILEC, the **ILEC** must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit **ILECs** from taking part in this practice. (¶ 69) Because "win-back" campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory.

The **FCC** again addressed "win-back" campaigns in Order No. **FCC 02-147**⁴, released May 15, 2002. In answer to commenters remarks

⁴In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana.

about BellSouth's marketing tactics, the FCC acknowledged state commission actions and stated:

We find that, in the absence of a formal complaint to us that BellSouth has failed to comply with section 222(b), the winback issue in this case has been appropriately handled at the state level, and that the actions undertaken by the state commissions and BellSouth should be sufficient to ensure it does not recur. The Georgia Commission issued an interim measure to prohibit BellSouth from engaging in any winback activities once a customer switches to another local telephone service provider. Since the Georgia Commission issued the interim measure, the Georgia Commission has opened a proceeding to investigate the allegations submitted to the state Commission, and determined that the staff of the Georgia Commission and the interested parties should develop a code of conduct for the industry. While there have been no formal complaints against BellSouth on this issue in Louisiana, the Louisiana Commission ordered BellSouth to abstain from any winback activities for seven days after a customer switches to another local telephone service provider, prohibited BellSouth's wholesale divisions from sharing information with its retail division, and prohibited the inclusion of marketing information in the final bill sent to a customer that has switched providers.

In Docket No. 960786A-TL, BellSouth witness Cox's testimony described the process used by BellSouth to determine which customers to target for possible "win-back" opportunities.

What happens is there is a list that is generated at some point in time that will say here are customers that have disconnected, and we can determine whether they moved or whether they, you know, left the area, those kinds of things. So we will take those off, and all we can do is assume that the rest went to a competitor somewhere. We don't know which competitor and we didn't know for sure that is what happened. But that is how we use that to target customers.

Regarding the timing of "win-back" marketing to regain a customer, Interrogatory No. 5a of Staff's Second Set of Interrogatories in this docket asked BellSouth **the** following question:

When a customer initiates account activity which may lead to losing that customer to an ALEC, does BellSouth immediately contact that customer to attempt to retain the customer with a promotion? If not, at what point in time does BellSouth attempt to retain or win back this customer?

BellSouth answered "No, in Florida BellSouth waits three to seven weeks after a disconnect order completes before contacting a customer." On April 11, 2002, the Commission received a memo from BellSouth advising that BellSouth recently implemented a region wide minimum 10 calendar days waiting period for sales contacts made to any customer who has placed an order to disconnect his/her retail local service from BellSouth.

Although we believe ALECs who have obtained a new customer from an ILEC should be allowed a period of time to complete the customer conversion, we do not believe it is appropriate, in this instance, to impose a waiting period whereby BellSouth would be precluded from initiating any "winback" activities. We note that billing errors by both the ALEC and ILEC can result during the conversion process, but it is not apparent how pervasive this problem is for FDN and BellSouth. However, we find that BellSouth shall be precluded from including any marketing information in its final bill sent to customers who have switched providers.

B. "Win-back" Marketing to Retain a Customer

As mentioned above, retention marketing refers to a carrier's attempts to persuade a customer to remain with that carrier before the customer's service is switched to another provider. Although the FCC has examined "win-back" retention marketing, we believe it is appropriate for us to address due to the complaints received from FDN and other carriers in Florida. In paragraph 16 of FDN's petition, FDN states:

The ALECs have experienced instances where BellSouth contacts customers about promotions when the customer has initiated account activity with BellSouth necessary to initiate a carrier change (e.g., changing or correcting a customer service record (CSR)), as well as at times suspiciously coincident to the CLEC's submitting a CSR request or local service request (LSR) to BellSouth.

The FCC has addressed retention marketing by ILECs in Order FCC 99-223, which states:

Several petitioners ask the Commission to reconsider Section 64.2005(b)(3) to permit use of CPNI for the retention of soon-to-be former customers without customer approval. On the other hand, other petitioners request that the Commission expressly prohibit ILECs from engaging in retention marketing. These petitioners claim that ILECs are using information derived solely from their status as providing carrier-to-carrier services to their competitors in an anti-competitive manner. Petitioners argue that the use of another carrier's order, including a carrier or customer request to lift a PIC freeze, is clearly and separately forbidden by sections 222(b) and 201(b).

We conclude that section 222 does not allow carriers to use CPNI to retain soon-to-be former customers where the carrier gained notice of a customer's imminent cancellation of service through the provision of carrier-to-carrier service. We conclude that competition is harmed if *any* carrier uses carrier-to-carrier information, such as switch or PIC orders, to trigger retention marketing campaigns, and consequently prohibit such actions accordingly. Congress expressly protected carrier information in section 222(a) by creating a duty to protect the confidentiality of proprietary information of other carriers, including resellers. Section 222(b) restricts the use of such proprietary information and contains an outright prohibition against the use of such information for a carrier's own marketing efforts. **As** stated in the *CPNI* Order, Congress' goals of promoting competition and preserving customer privacy are furthered

by protecting competitively-sensitive information of other carriers, including resellers and information service providers, **from** network providers that gain access to such information through their provision of wholesale services.

The FCC made it clear that there is no prohibition against an ILEC initiating retention marketing as long as the information regarding a customer switch is obtained through independent retail means. Order FCC 99-223 states:

We agree with SBC and Ameritech that section 222(b) is not violated if the carrier has independently learned from its retail operations that a customer is switching to another carrier; in that case, the carrier is free to use CPNI to persuade the customer to stay, consistent with the limitations set forth in the preceding section. We thus distinguish between the "wholesale" and the "retail" services of a carrier. If the information about a customer switch were to come through independent, retail means, then a carrier would be free to launch a "retention" campaign under **the** implied consent conferred by section 222(c)(1).

However, the FCC went on to state that:

..[w]here a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b). We concede that in the short term this prohibition falls squarely on the shoulders of the BOCs and other ILECs as a practical matter. As competition grows, and the number of facilities-based local exchange providers increases, other entities will be restricted from this practice as well.

conclusion

Based on the foregoing, we decline to impose a waiting period, whereby BellSouth would be precluded from initiating any "win-back" activities to regain a customer. However, we acknowledge that

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BellSouth has established a region wide, 10-day waiting period after the conversion to an Alternate Local Exchange Company (ALEC) is complete. Further, we find that BellSouth shall be prohibited from including any marketing information in its final bill sent to customers who have switched providers. Moreover, BellSouth's wholesale division shall be prohibited from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC.

Based on the foregoing, it is

ORDERED by the Florida public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

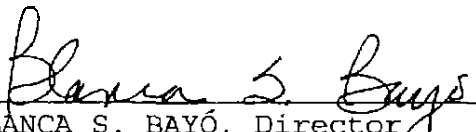
ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if a timely protest is filed, the issues set forth herein shall **be** considered severable, and any issue not specifically protested shall be deemed stipulated in accordance with Section 120.80113(b), Florida Statutes.

ORDERED that in the event this Order becomes final, this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 28th
day of June, 2002.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it **does** not affect a substantially interested person's right to a hearing.

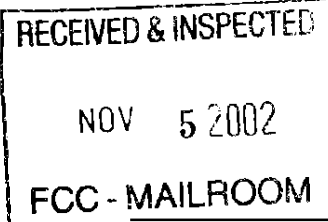
The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative

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Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on July 19, 2002.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Digital Network, }
Inc., for Expedited Review and Cancellation }
Of BellSouth Telecommunications, Inc.'s }
Key Customer Promotional Tariffs }
and For an Investigation Of BellSouth }
Telecommunications, Inc.'s Promotional }
Pricing And Marketing Practices }

Docket No. 020119-TP

Filed: February 14, 2002

PETITION OF FLORIDA DIGITAL NETWORK, INC.,
FOR EXPEDITED REVIEW AND CANCELLATION OF BELL SOUTH
TELECOMMUNICATIONS, INC.'S KEY CUSTOMER PROMOTIONAL TARIFFS

AND

PROMOTIONAL PRICING AND MARKETING PRACTICES

Florida Digital Network, Inc., ("FDN" or "Florida Digital") hereby petitions the Florida Public Service Commission ("FPSC" or "Commission") pursuant to Sections 364.3381(3), 364.01(4)(a), (c) and (g), Florida Statutes, to enforce Sections 364.01(4)(a), (c), and (g), 364.051(6), 364.08, 364.09, 364.10, and 364.3381(3), Florida Statutes, and, specifically, to immediately review and cancel or, alternatively, suspend or postpone, the 2002 Key Customer tariff and any like tariffs filed by BellSouth Telecommunications, Inc. ("BellSouth") and to launch a comprehensive investigation of BellSouth's promotional pricing and marketing practices. In support of its petition, FDN states as follows:

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BACKGROUND

1. FDN is an alternative local exchange carrier (“ALEC”) certificated by the FPSC. Therefore, FDN is a substantially affected competitor of BellSouth **and**, as such, has standing to file this proceeding. In addition, FDN is a retail business class customer of BellSouth.’

2. The Petitioner’s name, address and telephone number is:

Florida Digital Network, Inc.
390 North Orange **Ave.**
Suite 2000
Orlando, FL 32801
407-835-0300

3. The Petitioner’s representative’s name, address and telephone number **is**:

Matthew Feil
Florida Digital Network, Inc
390 North Orange Ave.
Suite 2000
Orlando, FL 32801
407-835-0460

4. BellSouth is a corporation organized and formed under the laws of the State of Georgia, having an office at 675 West Peachtree Street, Atlanta, Georgia, 30375. BellSouth provides local exchange and other services within its legacy franchised areas in Florida. BellSouth is a “Bell Operating Company” and an “incumbent local exchange carrier” (“ILEC”) under the terms of the Federal Telecommunications Act (“the Act”) and is certificated as a Florida ILEC.

5. According to ALEC-sponsored evidence presented in Docket No. 960786-TL (BellSouth’s 271 Case), BellSouth’s overall voice market share in Florida is over 90% -- still a monopoly for all practical purposes. Even by conservative estimates of business customer market share, BellSouth is by far the single dominant provider in its ILEC territory in Florida.

¹ Some of FDN’s regional offices receive BellSouth retail service

6. Through promotional pricing programs offered exclusively to ALEC business customers and potential ALEC business customers, BellSouth has used, and intends to continue to use, its dominant market status to selectively eliminate its business market competitors, causing substantial and irreparable harm to Florida's ALECs and to Florida's consumers. Meanwhile, BellSouth proposes to increase rates to its captive residential customers -- who are yet to have a real competitive choice in the state -- and to its own business customers.

7. Over the last year, BellSouth has filed with the Commission various promotional tariffs of temporary duration that offer price reductions to eligible subscribers. The two principle promotional programs BellSouth has tariffed in Florida for business class subscribers are known as the Full Circle program and the Key Customer program. The promotional discounts in these programs are **not** offered to **all** BellSouth business class subscribers. Rather, the Full Circle program had offered discounts up to 20% off billed revenue (lines and features) only to "former BellSouth business customers who have changed to another local service provider in the previous two years." The 2001 Key Customer program offers discounts of up to 18% off total billed revenue (lines and features), as well as a discount of up to 75% off the line hunting service and a waiver of line connection charges, to "business customers served from wire centers in competitive situations." Thus, only subscribers who *are* or could be served by a competitor could receive these promotional discounts.

8. **On** or about January 14, 2002, BellSouth filed a new promotional tariff, the 2002 Key Customer Program. The 2002 Key Customer program offers discounts of up to **25%** off total billed revenue (lines and features), as well as the line hunting service for free, and no connection charges to "businesses customers served from wire centers in competitive situations." BellSouth

proposed that this tariff become effective January 31, 2002, and remain effective through June 25, 2002. A copy of the pertinent tariff pages, printed from BellSouth's website, is attached hereto and marked "Exhibit A."

9. At some time after January 14, BellSouth revised the 2002 Key Customer Tariff. A copy of the revised tariff pages, printed from BellSouth's website, is attached hereto and marked "Exhibit B." These pages altered the eligibility language from "For business customers served from wire centers in competitive situations" to "For business customers served from hot wire centers" and added a page which lists the so-called "hot wire centers." The January 31, 2002, effective date proposed by the original filing and the discounts were not changed with the revised filing.² There are over 120 "hot wire centers," which apparently are those wire centers where competing carriers have a presence.

10. The Key Customer tariffs are designed to **apply** only to existing ALEC customers and potential ALEC customers.³ The programs' substantial discounts for basic and non-basic services are not offered to BellSouth residential customers and not to BellSouth business customers who do not have a competitive choice.

11. Upon information and belief, BellSouth does not generally market and promote the Key Customer programs to all eligible business customers. Rather, BellSouth target markets and promotes the Key Customer program only to business customers who have taken some action initiate a change of carrier from BellSouth to an ALEC.

² The revised pages bear the same tariff sheet revision level as the original pages, so they were apparently meant as substitute pages. However, as of this date, the Commission's Tariff Filing **Summary** Report lists only one Key Customer tariff filing, that on January 14.

³ The eligibility criteria for the Key Customer programs **make** no distinction between business customers who are or could be served by the various ALEC service strategies: facilities-based, UNE, UNE-P or reseller.

12. Nearly simultaneous to its filing the 2002 Key Customer discounts, BellSouth has filed tariffs to increase rates to its retail residential and business customers. BellSouth proposes to increase flat rate residential and business services, multi-line business services and various other services. The attached “Exhibit C” and “Exhibit D” are copies, printed from BellSouth’s website, of Tariff Distribution summaries for the rate increases effective **January** 19 and February 16, respectively. The attached “Exhibit E” is a schedule prepared by FDN summarizing the business class customer rate increases BellSouth has filed.

13. To take advantage of BellSouth’s promotional pricing, subscribers must accept a “poison pill” condition that makes it extremely costly for them *to* later change carriers. Subscribers that sign up to receive promotional discounts, but leave BellSouth service before expiration of the contract term must reimburse BellSouth for **all** discounts received and pay any applicable termination charges.

14. The Commission has not heretofore undertaken examination of the cost and price bases for BellSouth’s promotions, *either* in isolation, *or* in conjunction with the residential and business retail price increases BellSouth has just recently filed. Nor has the Commission heretofore undertaken an examination of BellSouth’s marketing practices for these promotional programs.

15. Last year, after a **flurry** of ALEC complaints that BellSouth disparaged ALECs to customers when marketing these promotional programs, the PSC staff made an informal inquiry of BellSouth’s marketing tactics. The matter was not docketed and the results of staff’s review were not published in a recommendation. In media reports, BellSouth had announced it had temporarily suspended certain “winback” activities. The particular winback activities suspended

were not identified. However, BellSouth's anticompetitive promotional price tariffing and associated activities continue.

16. In Docket No. 960786-TP (BellSouth's 271 Case), BellSouth witness Cox identified how BellSouth identifies former BellSouth customers to target market: BellSouth compiles a list from disconnect reports. However, BellSouth also target markets customers that intend to leave BellSouth. BellSouth has not explained how it identifies these soon-to-be-former customers. The ALECs have experienced instances where BellSouth contacts customers about promotions when the customer has initiated account activity with BellSouth necessary to initiate a carrier change (e.g. changing or correcting a customer service record (CSR)), as well as at times suspiciously coincident to the CLEC's submitting a CSR request or local service request (LSR) to BellSouth.

IRREPARABLE HARM & NEED FOR EXPEDITED TARIFF REVIEW

17. BellSouth's 2002 Key Customer Program purportedly went into effect on January 31, 2002. FDN requests that the Commission immediately act to either cancel or at least temporarily suspend/postpone the BellSouth Key Customer promotional tariffs pending investigation.

18. FDN and other ALECs have suffered and will continue to suffer irreparable competitive harm if BellSouth's promotional tariffs remain in effect. The Key Customer tariffs are also unduly discriminatory on their face. Expedited Commission action is required to prevent the irreparable harm that will result from these tariffs.

19. BellSouth's promotional tariffs are unlawful and anticompetitive on various factual and legal grounds, including the inducements offered by the promotions, the intent and effect of the promotions, the circumstances under which the promotions are offered and the limited group

of customers to whom they are made available. This much is clear: BellSouth, the dominant carrier in its Florida territory, has embarked on a course to selectively eliminate Florida's competing carriers through discriminatory offers and anticompetitive practices designed to lure away the competitors' current and potential customers

20. To support a finding of anticompetitive conduct under Chapter 364, the Commission need not find that the conduct amounts to a violation of state or federal antitrust laws. Indeed, there is no indication anywhere in Chapter 364 that for a carrier's behavior to be deemed anticompetitive, it must amount to an attempt to monopolize or a restraint of trade under the Sherman or Clayton Acts or the Florida Antitrust Act of 1980.⁴ Had the Legislature intended application of traditional antitrust standards to a Chapter 364 determination of anticompetitive conduct, it would have required such, but it did not. Rather, it is sufficient that the conduct in question is anticompetitive in effect or nature. Based on the plain meaning of the statute, the test is simply whether the conduct is more anticompetitive than pro-competitive. As explained below, that BellSouth's Key Customer tariffs are anticompetitive is beyond question.

21. The Commission has ample authority to cancel or to suspend/postpone anticompetitive, discriminatory, or otherwise unlawful tariffs, and to order a halt to anticompetitive, discriminatory or unlawful conduct, pursuant to Sections 364.01(4)(a), (c) and (g), 364.051(6), 364.08, 364.09, 364.10 and 364.3381(3), Florida Statutes.⁵ This authority pertains even if a tariff is "presumptively valid" under Section 367.051(6), Florida Statutes.⁶

⁴ Section 364.01(3), Florida Statutes, states that the regulatory oversight in chapter 364 does not limit the availability of antitrust remedies, thus acknowledging but not adopting antitrust standards while recognizing a possible overlap of jurisdiction in certain cases.

⁵ Were this not so, the Commission would be utterly powerless to halt the effect of such tariffs and related conduct by its own orders, despite the Commission's exclusive jurisdiction and legislative directives to promote competition, prevent anticompetitive behavior, eliminate discrimination, and protect the public health, safety and welfare.

22. In Docket No. 990043-TP (Petition to review and cancel BellSouth Telecommunication, Inc.'s promotional tariff (T-98-1783) by **Arrow** Communications), the Commission voted that it had the power to suspend or postpone the effective date of a price regulated tariff upon a prima facie showing that irreparable anticompetitive harm would result from that tariff. There, **Arrow**, a reseller, asked the Commission to cancel a BellSouth promotional tariff that offered discounts roughly equal to a reseller's wholesale discount to any customer who had switched from BellSouth to an ALEC as of a certain date. Specifically, BellSouth proposed a discount of free connection charges and three free months of service (the "Three Free" promotion) to ALEC customers who switched to BellSouth for an eighteen-month term of service.⁷ This amounted to a 16.6% discount over 18 months, while the reseller's wholesale discount was 16.81%. The Commission voted to suspend the Three Free promotional tariff pending resolution of Arrow's petition, finding irreparable competitive harm would result otherwise. The staff recommendation from the Arrow v. BellSouth docket file is attached hereto as "Exhibit F" and the vote sheet as "Exhibit G."⁸

23. The promotional scheme embodied in BellSouth's Key Customer tariffs is anticompetitive **and** therefore violates sections 364.01(4)(a), (c) **and** (g), 364.051(6) and 364.3381(3), Florida Statutes. There is simply no other way to characterize the conduct of a dominant, monopolistic provider who equals or undercuts the prices of its competitors, and even

⁶ Section 364.051(6), Florida Statutes, addresses a company's ability to **implement** on 15 days' notice **only tariffs** for nonbasic services. The tariffs at issue in this case are not exclusively for nonbasic services. Moreover, section 364.051(6) **also** provides that ILECs "shall not engage in any anticompetitive act or practice, nor unreasonably discriminate **among** similarly situated customers" and grants the Commission jurisdiction for preventing cross-subsidization of basic and nonbasic services and "ensuring that **all** providers are **treated fairly in the telecommunications market.**" Thus, "presumptively valid," even if applicable to a given **tariff, does not mean** "irrefutably valid" **as far as the Commission's powers** are concerned.

⁷ The Three Free tariff also provided that subscribers would **have** to reimburse BellSouth for all discounts if the subscriber migrated before the terms' end.

⁸ According to the docket file, BellSouth withdrew the tariff seventeen **days** after, *and* Arrow withdrew its petition twenty-two days after, the Commission's vote. No order **reflecting** the vote was issued.

offers some services for free, through inducements made exclusively to its competitors' customers. The anticompetitive character of this conduct is accentuated when these inducements are accompanied by an increase in prices for those customers not subject to competition.

24. **As** recognized in Arrow v. BellSouth, ALECs compete with BellSouth largely on the basis of price. That finding is true whether the ALEC is a reseller, facilities-based, a UNE *or* UNE-P provider. As confirmed in the attached affidavit of FDN's Chief Operating Officer, Michael P. Gallagher, attached hereto as "Exhibit H," FDN competes with BellSouth largely on the basis of price, and BellSouth's Key Customer promotions equal or exceed the prices FDN may offer and still remain viable.

25. Under BellSouth's Key Customer promotion, the Florida ALECs' ability to compete will evaporate since BellSouth offers exclusively to the competitors' customers rates that are virtually the same as its competitors' rates, and lower than an ALEC reseller's wholesale cost.

26. The Key Customer prices are designed to, and have no purpose other than to, eliminate the competition. Though the promotions may initially create some losses or lower profits for BellSouth, they presage higher monopolistic prices and greater profits hereafter as competitors fail. The small market share BellSouth has lost to ALECs is insignificant when compared to BellSouth's over-all presence in the market.

27. If BellSouth's promotional prices were not designed to eliminate the competition, they would be offered to all BellSouth's customers, not just to ALEC and potential ALEC customers. Further, the promotions would not be coupled with a penalty for subsequent customer migration, nor be coincident to price increases for customers not subject to competition.

28. As stated above, the Commission has not reviewed the cost bases for the promotional discounts. The Commission is required to do so in support of a finding of anticompetitive behavior and irreparable harm, or to suspend/postpone a tariff. Pricing below profitability is not the applicable legal test. Rather, the Commission may act to halt (at least temporarily) any pricing/conduct that on its face is more anticompetitive than pro-competitive. In any case, one cannot say BellSouth's promotional prices are at a point above profitability or may be offered as a result of BellSouth's superior efficiency without questioning: (a) why BellSouth does not offer the promotional prices and **free** services to all of its customers, (b) how BellSouth **can** offer free and significantly discounted service without creating cross subsidies, (c) why BellSouth has increased rates to its other retail customers, and (d) why the tariff requires **a** subscriber to reimburse BellSouth if migrating before term's end.

29. The fact that BellSouth can charge rates to one group of small business customers that are **25%** lower than its regular retail rates also calls into question the sufficiency of the avoidable costs that BellSouth has alleged as the basis for reducing its retail rates to resellers. If BellSouth can make do with revenue from small business customers that is reduced by **25%**, then perhaps BellSouth needs less revenue ~~from~~ its small business customers *and/or* BellSouth's wholesale rate to resellers should have a greater percentage reduction than the rate currently approved by the commission.

30. The promotional scheme BellSouth embodied in its proposed tariff is also objectionable because it violates the discrimination and discounted service prohibitions of Sections 364.08, 365.09 and 364.10, Florida Statutes. The tariff extends discounted rates to one segment of small business customers who are indistinguishable from all other small business customers during the effective period of the lower rates. The only difference between the *two*